

MICHAEL A. CARDOZO
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

AMY N. OKEREKE
Assistant Corporation Counsel
(212) 788-9790
(212) 788-9776 (fax)
aokereke@law.nyc.gov

May 14, 2008

BY FAX

Fax: (212) 805-0426

Honorable Laura Taylor Swain
United States District Judge
Southern District of New York
500 Pearl Street, Room 755
New York, New York 10007

MEMO ENDORSED

Re: James Patrick Colliton v. Michael S. Morgan, et al.
07 Civ. 8269 (LTS)(THK)

Your Honor:

I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for defendants Raymond Kelly and Joseph Cardieri in the above-referenced civil rights action. For the reasons detailed herein, defendants respectfully request permission to move to dismiss the amended complaint in lieu of an answer pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants Kelly and Cardieri were previously given an enlargement of time, until May 16, 2008, to respond to the amended complaint in this matter. However, should the Court grant defendants leave to move, defendants propose to serve their moving papers on July 14, 2008, as set forth below.

Pro se plaintiff, James Colliton, brings this action pursuant to 42 U.S.C. § 1983, alleging that defendants falsely arrested and maliciously prosecuted him. Plaintiff alleges that on March 3, 2006, pursuant to New York County Indictment No. 861/2006, defendants falsely arrested him and illegally detained him without bail for approximately eleven months. Plaintiff, however, acknowledges in his amended complaint that he pled guilty to several of the counts charged in Indictment No. 861/2006 and for which he was arrested on March 3, 2006.

Plaintiff's amended complaint must be dismissed because he cannot assert claims for malicious prosecution and false arrest founded on an arrest and prosecution where plaintiff was subsequently convicted and such conviction has not been invalidated. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994); Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254, 256 (2d Cir. 1998) ("A claim for damages bearing [a] relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983). It is well settled that a plaintiff cannot bring claims for false arrest and malicious prosecution when he has been convicted of a crime

Copies mailed/faxed to
Chambers of Judge Swain

ALL PARTIES
5-16-08

stemming from the allegedly false arrest, and that conviction has not been invalidated. See, e.g., Duamutef v. Morris, 956 F.Supp. 1112, 1117 (S.D.N.Y. 1997) (dismissing §1983 claims of malicious prosecution, false arrest, perjury, retaliation against first amendment rights, and denial of equal protection due to a failure to state a claim under Heck because of the valid underlying criminal conviction). Here, it is undisputed that plaintiff was arrested on March 3, 2006 pursuant to New York County Indictment No. 861/2006, that plaintiff subsequently pled guilty to charges stemming from his indictment and arrest, and that plaintiff's conviction has not been invalidated. Therefore, plaintiff cannot sustain his claims for malicious prosecution and false arrest.

In view of the foregoing, defendants Kelly and Cardieri believe they possess a good faith legal basis to move against the complaint in lieu of an answer, and respectfully request the Court's leave to do so. Should the Court grant defendants leave to move, defendants respectfully propose the following briefing schedule:

Motion papers to be served by defendants:	July 14, 2008
Opposition papers to be served by plaintiff:	August 13, 2008
Reply papers, if any, to be served by defendants:	August 25, 2008

Accordingly, defendants Kelly and Cardieri respectfully request permission to file a motion to dismiss the amended complaint in lieu of an answer pursuant to Fed. R. Civ. P. 12(b)(6) and as set forth in the schedule detailed above.

Thank you for your consideration in this regard.

Respectfully submitted,



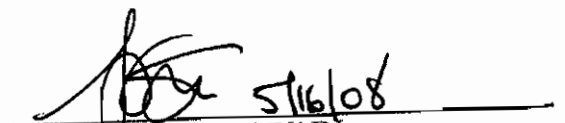
Amy N. Okereke
Assistant Corporation Counsel
Special Federal Litigation Division

cc: Honorable Theodore H. Katz, United States Magistrate Judge (by hand)

James Patrick Colliton, plaintiff *pro se*
28 Millbank Road
Poughkeepsie, New York 12603 (by first class mail)

The proposed briefing schedule is approved. Counsel must comply with subdivision 2B of the undersigned's Individual Practitioner Rules in connection with the motion practice.

SO ORDERED.



LAURA TAYLOR SWAIN
UNITED STATES DISTRICT JUDGE